

CHAPTER 178
VARIANCES AND WAIVERS OF PUBLIC HEALTH
ADMINISTRATIVE RULES

641—178.1(135) Applicability. This chapter governs waivers or variances from department rules in the following circumstances: (1) the director of public health has exclusive rule-making authority to promulgate the rule from which waiver or variance is requested or has final decision-making authority over a contested case in which waiver or variance is requested; and (2) no statute or rule otherwise controls the grant of a waiver or variance from the rule from which waiver or variance is requested.

641—178.2(135) Director's authority. The director, or the presiding officer as part of the decision in a contested case, may grant a waiver of, or variance from, all or part of a rule.

641—178.3(135) Compliance with statute. No waiver or variance may be granted from a requirement that is imposed by statute. Any waiver or variance must be consistent with statute.

641—178.4(135) Criteria. A waiver or variance under this chapter may be granted only upon a showing that:

178.4(1) Substantially equal protection of health and safety will be afforded by a means other than that prescribed in the particular rule for which the variance or waiver is requested; and

178.4(2) The waiver or variance will not harm other persons and will not adversely affect the public interest; and

178.4(3) Because of special circumstances, either the requester is unable to comply with the particular rule without undue hardship or compliance with the particular rule would be unnecessarily and unreasonably costly and serve no public benefit.

641—178.5(135) Request. A request for a waiver or variance must be submitted in writing to the department with a copy to the director. Submissions to the department shall be directed within the department according to the nature of the proceeding to which the waiver or variance relates.

178.5(1) License or permit. If the request relates to an application for, or limitation on, a license or permit, the request shall be made in accordance with the filing requirements for the license or permit in question.

178.5(2) Contested cases. If the request relates to a pending contested case, the request shall be filed in the contested case proceeding.

178.5(3) Other. If the request does not relate to a particular license or permit and it is not related to a pending contested case, the request may be submitted to the Coordinator for Administrative Rules, Department of Public Health, Lucas State Office Building, Des Moines, Iowa 50319.

641—178.6(135) Elements. A request for waiver or variance shall include the following information where applicable:

178.6(1) The name, address, and telephone number of the person requesting the waiver or variance and the person's representative, if any.

178.6(2) The specific rule from which a waiver or variance is requested.

178.6(3) The nature of the waiver or variance requested, including any alternative means or other proposed condition or modification proposed to achieve the purpose of the rule.

178.6(4) An explanation of the reason for the waiver or variance, including all material facts relevant to the grant of the waiver or variance in question.

178.6(5) A description of any prior contacts between the department and the requester relating to the regulated activity or permit affected by the proposed waiver or variance, including a list or description of department permits held by the requester, any notices of violation, contested case hearings, or investigative reports relating to the regulated activity or permit within the last five years.

178.6(6) The name, address, and telephone number of any public agency or political subdivision which also regulates the activity in question or which might be affected by the grant of a waiver or variance.

178.6(7) Any information known to the requester regarding the department's treatment of similar cases.

178.6(8) The name, address, and telephone number of any person with knowledge of the relevant facts relating to the proposed waiver or variance.

178.6(9) Any necessary releases of information authorizing persons with knowledge to disclose relevant information to the department.

641—178.7(135) Ruling. The department shall respond in writing to all requests. The ruling shall include the reason for granting or denying the request and, if approved, the time period during which the waiver or variance is effective. Rulings on a waiver or variance shall be made by the director in the following manner:

178.7(1) Agency staff to whom the request was properly directed shall make a recommendation to the director when the request relates to an application for, or limitation on, a license or permit, or relates to any other matter except a contested case. The director shall respond to the request.

178.7(2) The presiding officer in a contested case shall respond to a request relating to a pending contested case proceeding in the proposed or final decision of the agency. The director may affirm, reverse, or modify the response on intra-agency appeal.

641—178.8(135) Public availability. All final rulings in response to requests for waivers or variances shall be indexed and available to members of the public in the Office of the Coordinator for Administrative Rules, Department of Public Health, Lucas State Office Building, Des Moines, Iowa 50319. In addition, the director shall notify the board of health of any ruling to grant a waiver or variance at its next regularly scheduled meeting following the ruling.

641—178.9(135) Conditions. The director may condition the grant of a waiver or variance on such reasonable conditions as appropriate to achieve the objectives of the particular rule in question through alternative means.

641—178.10(135) Voiding or cancellation. A waiver or variance is void if the material facts upon which the request is based are not true or if material facts have been withheld. The director may at any time cancel a waiver or variance upon appropriate notice and hearing if the director finds that the facts as stated in the request are not true, material facts have been withheld, the alternative means of compliance provided in the waiver or variance has failed to achieve the objectives of the statute, or the requester has failed to comply with conditions set forth in the waiver or variance approval.

641—178.11(135) Violations. Violation of conditions in the waiver or variance approval is the equivalent of violation of the particular rule for which the waiver or variance is granted and is subject to the same remedies or penalties.

641—178.12(135) Appeals. Any request for an appeal from a decision by the director granting or denying a variance or waiver shall be in accordance with the procedures provided in Iowa Code chapter 17A. An appeal shall be taken within 30 days of the issuance of the ruling in response to the request unless a contrary time is provided by rule.

Any request for an appeal from a decision by the presiding officer in a contested case proceeding granting or denying a variance or waiver shall be in accordance with the procedures provided in 641—Chapter 173. An appeal shall be taken within ten days of the issuance of the presiding officer's proposed decision in response to the request unless a contrary time is provided by rule. Notwithstanding any departmental rule to the contrary, the director may, upon notice to the parties to a contested case given within ten days of the issuance of the presiding officer's proposed decision, review a presiding officer's proposed decision in which a variance or waiver has been granted or denied regardless of whether any party to the contested case proceeding requests an appeal. The director may then affirm, reverse, or modify the presiding officer's decision granting or denying a variance or waiver.

These rules are intended to implement Iowa Code section 135.11.

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CHAPTER 179

Reserved